IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. .....

JULIUS ARONOFF,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

There was no opinion rendered by the Trial Court relating to the within petitioner. The opinion of the Circuit Court below (R. 189), rendered on October 29, 1943, is still unreported.

II

Jurisdiction

The Court is respectfully referred to Subdivision II of the petition (supra, p. 2) on the question of jurisdiction. Said Subdivision II is herewith adopted and made a part of this brief.

III

Statement of the Case

A statement of the case has been made in the preceding petition under I (pp. 1 and 2), which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The errors relied upon are those set forth in the questions presented in paragraph III of the foregoing petition, which are hereby adopted and made part of this brief.

V

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the appendix.

ARGUMENT

A

In order to sustain the charges against the petitioner the burden rested squarely upon the Government to prove that this petitioner:

(1) knowingly and with a criminal intent entered into an unlawful conspiracy with the other defendants to transfer in anticipation of bankruptcy and to conceal from the trustee in bankruptcy property which belonged to the Famous Furniture Co. Inc. (Count One);

(2) knowingly and fraudulently, with the other defendants, and between the 1st day of March, 1940 and the 7th day of March, 1941, commenced to conceal and between the 7th day of March, 1941 and the date of the filing of the indictment fraudulently concealed from the trustee in bankruptcy property belonging to the Famous Furniture Co. Inc. (Count Two);

(3) while the defendants Benjamin Goldberg and Harry Goldberg were officers of the Famous Furniture Co. Inc., and with the other defendants, wilfully and fraudulently, in contemplation of a proceeding under the National Bankruptcy Act against the Famous Furniture Co. Inc., and with intent to defeat the National Bankruptcy Act, transferred property of the Famous Furniture Co. Inc. (Count Three).

In connection with all of the crimes alleged in the indictment the Government was required to establish the following necessary elements:

1. Proof that the property involved was the property of the Famous Furniture Co. Inc.

2. Proof that the petitioner had actual knowledge of a scheme to dispose of or transfer part of the property of the Famous Furniture Co. Inc. in contemplation of bankruptcy.

3. Proof that the petitioner with intent to abet the crimes charged in the indictment aided in the transfer of the property of the Famous Furniture Co. Inc. with the knowledge on the part of the petitioner that the bankruptcy of the Famous Furniture Co. Inc. was contemplated and that the property was to be concealed from the trustee.

United States v. *Yasser*, 114 F. (2d) 558.

It would be superfluous to state that if the property allegedly concealed or transferred was not the property

of the bankrupt, Famous Furniture Co. Inc., then the crimes alleged were not proven.

United States v. *Knopfer*, 12 F. Supp. 980.

A significant feature about this entire record is the fact that there is no evidence of any probative value that the property involved actually belonged to the Famous Furniture Co. Inc. On the other hand, the testimony of the Government's witnesses establishes that legal title to this property was in either B. Glass Inc. or the Majestic Factors Corporation.

There is no satisfactory evidence that the Famous Furniture Co. Inc. had legal or equitable title to the property.

The property involved was located at Suffern, New York, at the place of business of B. Glass Inc. The name indicates that it was a separate and distinct corporation which the defendant Benjamin Goldberg testified he acquired in the "form of a purchase" (232). No details were furnished. Throughout the record the witnesses for the Government continuously drew distinctions between the business of the Famous Furniture Co. Inc. and B. Glass Inc. (R. 56, 62, 80, 81, 83, 84, 86, 91, 94, 101, 103, 107, 111, 114, 119, 176, 233, 236, 237, 240, 242, 328, 329, 333). The only evidence in the record that the Famous Furniture Co. Inc. had any interest in the property is the boast of the defendant Benjamin Goldberg that "everything that Ben. Goldberg did was on behalf of the Famous Furniture Company" (R. 233).

The Government does not contend that the restocking of B. Glass Inc. was at the suggestion or with the knowledge of the petitioner. In fact, the defendant Benjamin Goldberg, after restocking B. Glass Inc., first began negotiations with others to sell and dispose of the merchandise (R. 235-236). No petition in bankruptcy was ever filed against B. Glass Inc. This company is not mentioned at any place in the indictment.

The question of title to the merchandise is further complicated by the fact that the assets of B. Glass Inc. had previously been transferred to the Majestic Factors Corporation. A Government witness testified that on January 7, 1941, the assets of B. Glass Inc. were transferred to the Majestic Factors Corporation and all the income of B. Glass Inc. belonged to the Majestic Factors Corporation (R. 81-82).

While there was interjected into the record of this case some evidence that three loads of furniture were taken from the Famous Furniture Co. to the Bergen Furniture Co. (R. 346), the circumstances surrounding this delivery are not explained in the record nor was this property ever identified. Moreover, the petitioner's connection with this transfer, if any, is not clear. The Government's entire case was predicated upon the transfer of the property from the place of business of B. Glass Inc.

This fatal defect in the evidence—the failure of proof that the property involved actually belonged to the Famous Furniture Co. Inc.—required the acquittal of the petitioner of the crimes charged in the indictment.

B

A very vital question in this case, as recognized by the Learned Circuit Court below, was whether or not (assuming title remained in Famous Furniture Co. Inc. after the transfer to B. Glass Inc.) either Famous Furniture Co. Inc. or its trustee in bankruptcy nevertheless had any equity in the Suffern furniture. The proof is clear that before petitioner had any dealings with respect to this furniture it was transferred to Majestic Factors Corporation in return for a loan of $5,000. It is not apparent exactly what the nature of the "transfer" was. However, assuming it to have been in the nature of a lien or pledge, the burden rested squarely upon the Government to prove that Famous Furniture Co. Inc. or its trustee had an equity or property right in the furniture alleged to have been

transferred to the petitioner over and above the amount of the loan.

There was in fact no probative evidence to sustain this burden.

That the evidence actually adduced may be demonstrated mathematically to exclude any possibility that the bankrupt or its trustee had an equity or property interest in the furniture allegedly transferred to petitioner from Suffern has been pointed out in the foregoing petition. In addition to this, it is evident from the opinion of the learned Circuit Court below that that Court, after a careful review of the evidence, felt there had been no concrete offering by the Government to sustain its burden on this point and preferred to disregard the Government's purported proof to rest its affirmance of petitioner's conviction upon the assumption (which, owing to the lack of evidence, the Court itself was compelled to draw) that there must have been an equity, otherwise the lendor would not have received the furniture as security.

The patent error of relying upon such a conjectural and unwarranted assumption to support petitioner's conviction upon criminal charges is obvious and startling.

C

There is no evidence in the record that petitioner knew about the financial condition of the Famous Furniture Co. Inc. or that bankruptcy was contemplated. From all that appears from the testimony of Benjamin Goldberg, the petitioner heard that the defendant Benjamin Goldberg was selling the stock of B. Glass Inc. and that the petitioner was anxious to interject himself in this transaction (R. 236-237) to earn a commission (R. 375).

The record simply shows in this case a sale of the property of B. Glass Inc. at 90¢ on the dollar. The testimony of the defendant Benjamin Goldberg was to the effect that he sold the merchandise to the petitioner and the defendant Greenberg (R. 241-242). He is emphatic in his statement that "there was a sale agreed upon" (R. 249).

The sum and substance of the testimony of Benjamin Goldberg is his claim that he sold the merchandise but did not get paid (R. 243). Proof of the sale and the testimony of the alleged accomplices does not establish the crimes charged in the indictment.

In *United States* v. *Waldman*, 188 Fed. 524, District Judge Holt wrote as follows (p. 527):

> "The fact that the bankrupt's goods were removed by persons having no connection with the bankrupt has no tendency to show a conspiracy to induce the bankrupt to conceal the goods from the trustee. The two things inherently have no connection. The circumstances of the transaction, if stated, might show some connection; but, unless stated, no connection is apparent."

In *Bartkus* v. *United States*, 21 F. (2d) 425, the evidence showed that before the bankruptcy of a company some merchandise owned by the company found its way into the possession of certain defendants who were relatives of the president of the company. The defendant testified that they bought the merchandise. The Court, in reversing the judgment of conviction, wrote as follows (p. 427):

> "The fact that some merchandise which had been purchased by bankrupt (and also may have been sold by it) found its way into the possession of Kelps, Nevar and Dronsuth, even under the suspicious circumstances mentioned, does not go far to establish that they conspired with Bartkus to commit the crime charged. The record shows that the merchandise which found it way into this garage was not of large amount or value. Government's counsel say it was 'at least some'. No effort was made to take possession of it for the bankrupt."

D

The foregoing petition sets forth petitioner's grievance with respect to the charge of the Trial Court. Briefly repeated, petitioner contends that the Court submitted but

one issue to the jury for its determination with an instruction that if they found the affirmative of that issue, namely, that if petitioner had participated in the transactions testified to, their verdict must be one of guilt. The issue thus submitted was but one of several issues in this case that required proper framing by the Court and specific submission to the jury.

As has been pointed out, there was a grave issue of fact as to whether or not bankrupt or its trustee had any title to the Suffern property mentioned in the indictment. There was a grave issue as to whether or not, assuming the bankrupt or its trustee had a technical title, they had any equity or valuable property right in the Suffern furniture. And there was a grave issue as to whether or not, so far as petitioner was concerned, the entire transaction with respect to the Suffern furniture was simply a transaction of purchase and sale or whether it was a fraudulent transfer and theft.

Petitioner, under the Constitution, was entitled to have each and every one of these issues resolved by the jury, and it is evident that the Court's failure to frame and submit them to the jury was a clear violation of petitioner's constitutional right.

Nor can it be said that the Court's omission in this regard was not of the most vital importance to the petitioner, for it is evident that any one of these additional issues may have been decided by the jury in petitioner's favor, and that if so decided, the jury would have been required to return a verdict exonerating petitioner from the charges made against him.

It is true that assigned counsel for petitioner did not take exception to the Court's charge based upon the foregoing errors, but this technical omission ought not to be considered as foreclosing, once and for all, the petitioner's right to a full, fair and impartial trial by jury. Indeed, this Honorable Court time and again has enunciated and affirmed the principle that such technical omissions would

not avail to deprive a defendant in a criminal case of a substantial right.

Title 28, U. S. C. A., Sec. 391;
Weiborg v. *United States*, 163 U. S. 632, 658;
United States v. *Atkinson*, 297 U. S. 157, 160;
Brasfield v. *United States*, 272 U. S. 448, 450;
New York C. R. Co. v. *Johnson*, 279 U. S. 310, 318;
Crawford v. *United States*, 212 U. S. 183, 194.

The foregoing principle is especially applicable where, as in the present case, petitioner was represented upon the trial by assigned counsel not of his own choosing.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

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Attorney for Petitioner.